Filed 10/14/20 Marriage of Cassinelli CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of JANICE R. and ROBERT J. CASSINELLI	
JANICE R. CASSINELLI, Appellant, v. ROBERT J. CASSINELLI, Respondent.	E072789 (Super.Ct.No. D54420) OPINION

APPEAL from the Superior Court of Riverside County. Robert W. Nagby, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Clark & Gomez and Julie M. Clark for Appellant.

Law Offices of Ellen C. Dove and Ellen C. Dove for Respondent.

In 1986, when Robert and Janice Cassinelli were divorced, Robert was ordered to pay Janice $541 a month as her share of his military retired pay. In 2013, Robert stopped receiving military retired pay and started receiving different military-related benefits

instead. Federal law barred a state court from awarding Janice any share of these latter benefits. Janice therefore filed the present proceeding for spousal support.

In 2019, after a protracted procedural history — including a previous opinion by this court, a grant of certiorari by the United States Supreme Court, and a new opinion by this court — the trial court denied Janice any spousal support.

Janice appeals. We will hold that she has not shown that the denial of spousal support was an abuse of discretion. Hence, we will affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

Janice and Robert were married in 1964. At that time, Robert was on active duty as a member of the United States Air Force. After 20 years of service, he retired from the military. In 1985, the parties separated. Janice then filed this marital dissolution proceeding.

In 1986, pursuant to stipulation, the trial court entered a final judgment. It awarded Janice a 43.1 percent interest in Robert's military retired pay. It reserved jurisdiction over the issue of spousal support.

In 2012, it was determined that Robert had a combat-related disability. As a result, in 2013, he stopped receiving military retired pay and started receiving veteran's

disability benefits and combat-related special compensation. This meant that Janice stopped receiving her share (at that time, $541 a month[1]) of Robert's military retired pay.

In January 2014, Janice filed a motion to modify the judgment by ordering Robert to pay her spousal support. In August 2014, she filed a motion for attorney fees. In April 2015, the trial court awarded her spousal support of $541. It also awarded her $7,180 in attorney fees.

Robert appealed. In a partially published opinion, we upheld both awards. (*In re Marriage of Cassinelli* (2016) 4 Cal.App.5th 1285.) Robert then petitioned for certiorari. The Supreme Court granted the petition, vacated the judgment, and remanded for further consideration in light of *Howell v. Howell* (2017) 581 U.S. ___ [137 S.Ct. 1400] (*Howell*). (*Cassinelli v. Cassinelli* (2017) 138 S.Ct. 69.)

On remand, in 2018, we held that the support award constituted reimbursement or indemnification for the loss of Janice's share of Robert's military retired pay, which was prohibited under *Howell*. (*In re Marriage of Cassinelli* (2018) 20 Cal.App.5th 1267, 1273-1275.) However, we also held that the trial court had discretion to treat this loss as a changed circumstance, which called for an award of spousal support, in some amount. (*Id*. at p. 1275) Thus, we remanded with directions to "hold a new trial on Janice's request for a modification of spousal support." (*Id*. at p. 1278.)

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[1] There is some evidence that the amount was $540. The difference is not material.

Before trial, Janice filed a request for $26,334.08 in additional attorney fees and costs.

The case was tried to the court on two non-consecutive days — December 17, 2018 and January 25, 2019.

In March 2019, the trial court issued a methodical and detailed statement of decision. It denied Janice any spousal support.

The trial court noted that, according to Janice's income and expense declaration,[2] she had income from three sources: Social Security, a retirement plan, and an annuity. It totaled $1,885 a month. Also according to her income and expense declaration, her expenses were $4,168.50 a month. Based on her trial testimony, however, the trial court found that this was "excessively exaggerated." It did not specifically find what her true expenses were.

According to Robert's income and expense declaration, he had income from four sources: Social Security, state teacher's disability, veteran's disability, and combat-related special compensation (CRSC). These totaled $5,856.68. Also according to his income and expense declaration, his expenses were $5,617 a month. This did not include the $9,603 (i.e., the $7,180, plus interest) that he owed Janice for attorney fees.

The trial court gave little weight to the marital standard of living, because "[t]he parties last resided together over thirty-three (33) years ago."

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[2] All references to the parties' income and expense declarations are to their most recent pretrial income and expense declarations, dated November 2018.

It accepted that Janice "should not be expected to keep working past her normal retirement age . . . ." However, it noted that "[p]ost-dissolution support is typically awarded for only as long as necessary to permit the supported spouse to become self-supporting." "Here, [Janice] has had thirty-three (33) years after termination of the marriage to become self-supporting. [Janice] did just that. . . . Absent attorney fees associated with this matter and some credit card debt, [Janice] has been able to attain a self-supporting lifestyle."

It concluded: "Although [Janice] has demonstrated that she has some need, the court cannot find that [Robert] has the ability to pay." "Based on [Robert's] needs . . . , in order to grant [Janice's] request for spousal support (which the court believes she needs), the court would need to take the funds from a disabled military veteran who would then be unable to meet his own legitimate living expenses." It also denied Janice any attorney fees.

Under the 2015 order awarding spousal support — which we reversed in 2018 — Janice had collected $8,531 from Robert. The trial court ordered this offset against Robert's $9,603 liability for attorney fees.

II

APPEALABILITY

Preliminarily, Robert contends that the statement of decision is nonappealable.

A. *Additional Factual and Procedural Background*.

Before the record was filed, Robert filed a motion to dismiss the appeal, in which he argued that the statement of decision was not an appealable order. Janice filed an opposition. We denied the motion. We ruled that, regardless of its label, the statement of decision was, in substance, a post-judgment order.

B. *Discussion*.

In his respondent's brief, Robert argues that we erred by denying his motion to dismiss. However, he adds: "Responde[nt] wishes to preserve this argument for further appeals but is willing to waive for further discussion at this time. This waiver is only done contingent upon this appeal being the last, and heard on its merits."

Robert cannot "waive" the issue of appealability. "The existence of an appealable judgment is a jurisdictional prerequisite to an appeal." (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 126.) "Jurisdiction cannot be conferred upon an appellate court by waiver. [Citation.]" (*Baker v. Castaldi* (2015) 235 Cal.App.4th 218, 225.)

We adhere, however, to our order denying the motion to dismiss.

"The general rule is that a statement or memorandum of decision is not appealable. [Citations.] The rule's practical justification is that courts typically embody their final rulings not in statements of decision but in orders or judgments. Reviewing courts have discretion to treat statements of decision as appealable when they must, as when a statement of decision is signed and filed and does, in fact, constitute the court's final decision on the merits. [Citations.] But a statement of decision is not treated as

appealable when a formal order or judgment does follow . . . . [Citations.]" (*Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894, 901.)

The statement of decision here was signed and filed. It did not direct either of the parties to prepare a formal order. Robert nevertheless submitted a proposed formal order; the trial court, however, did not sign it. As far as the record shows, the trial court took no steps to enter any further formal order.

We therefore conclude that the statement of decision constituted the trial court's final decision on the merits. Accordingly, it is appealable.

III

JANICE'S SHOWING OF NEED

In an effort to preempt Janice's contentions wholesale, Robert contends that the trial court erred by finding that she showed need.

Ordinarily, in determining spousal support, the trial court must consider, weigh, and balance a list of factors set forth in section 4320.[3] As Robert notes, however, section 4322 states: "[W]here there are no children, and a party has or acquires a separate estate . . . sufficient for the party's proper support, no support shall be ordered . . . against the other party." Thus, if Janice did not show need, she was not entitled to any spousal support, and the trial court was not required to consider any of the section 4320 factors. (*In re Marriage of Terry* (2000) 80 Cal.App.4th 921, 928.)

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[3] This and all further statutory citations are to the Family Code, unless otherwise specified.

"Generally, a respondent who has not appealed from a judgment or appealable order may not urge error on appeal. However, an exception applies where a respondent raises an issue on an interim ruling for the purpose of determining whether the appellant was prejudiced by the asserted error. [Citations.]" (*San Diegans for Open Government v. Har Construction, Inc.* (2015) 240 Cal.App.4th 611, 627; see also Code Civ. Proc., § 906.)

The trial court found that "[Janice] has demonstrated that she has some need . . . ." "'It is well established that a reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact.' [Citations.] [Robert's] contention herein 'requires [Robert] to demonstrate that there is no substantial evidence to support the challenged findings.' [Citations.] . . . Accordingly, if, as [Robert] here contend[s], 'some particular issue of fact is not sustained, [he is] required to set forth in [his] brief *all* the material evidence on the point and *not merely* [*his*] *own evidence*. Unless this is done the error is deemed to be waived.' [Citations.]" (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881-882.)

Robert has set forth almost none of the evidence relevant to Janice's need for support. Accordingly, he has forfeited this contention.

IV

THE EXEMPT STATUS OF ROBERT'S INCOME

Robert also preemptively contends that all of his income is exempt from execution.

This contention conflicts with the law of the case. "'The doctrine of "law of the case" deals with the effect of [a] *first appellate decision* on the subsequent . . . *appeal*: The decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case.' [Citation.]" (*Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 491.)

"The doctrine of the law of the case applies even though the appellate court may be of the opinion that the former decision is erroneous [citations] . . . ." (*Wells v. Lloyd* (1942) 21 Cal.2d 452, 457.) "'Indeed, it is only when the former rule is deemed erroneous that the doctrine of the law of the case becomes at all important.' [Citation.]" (*Morohoshi v. Pacific Home*, *supra*, 34 Cal.4th at p. 491.)

Robert raised this identical contention in the previous appeal. We rejected it then, saying:

"Robert's income consists of veteran's disability benefits, state teacher's disability benefits, Social Security, and CRSC. Arguably some or all of these funds would be exempt from an ordinary money judgment. However, they are not exempt from a spousal support order. Specifically, a spousal support order would be enforceable against Robert's:

"1. Veteran's disability benefits . . . . [Citations.]

"2. CRSC. [Citation.]

"3. Social security benefits. [Citations.]

"4. State teacher's disability benefits. [Citations.]" (*In re Marriage of Cassinelli*, *supra,* 20 Cal.App.5th at pp. 1277-1278.)

Robert has not shown that any exception to the doctrine of the law of the case applies. (See generally *Morohoshi v. Pacific Home*, *supra*, 34 Cal.4th at pp. 491-492.) Hence, we reject this contention again.

V

FAILURE TO MAKE FINDINGS REGARDING

THE PARTIES' INCOME AND EXPENSES

Janice contends that the trial court erred by failing to make "specific" findings regarding each party's actual income and expenses.

The trial court did make specific findings. It found, based on Robert's income and expense declaration, that his income was $5,856.68 a month and his expenses were $5,617 a month. Based on Janice's income and expense declaration, it found that her income was $1,885 a month. Admittedly, it did not assign any dollar figure to her expenses. However, this was because Janice was the only source of evidence of the dollar figures, and it found that she had "exaggerated" them. In the absence of credible evidence of the amounts, it could not make findings regarding them.

In any event, Janice has not shown that this was prejudicial. (See Cal. Const., art. VI, § 13; *In re Marriage of Morton* (2018) 27 Cal.App.5th 1025, 1051.) "An appellant in a civil case establishes an error was prejudicial by showing there is 'a reasonable probability that in the absence of the error, a result more favorable to the

appealing party would have been reached.' [Citation.]" (*In re Marriage of Morton, supra,* 27 Cal.App.5th at p. 1051.) Here, the trial court accepted that Janice had shown "some need" — i.e., that her expenses exceeded her income. Nevertheless, it declined to award her any spousal support. Janice does not explain how the outcome would have been any different if the trial court had assigned a dollar figure to her expenses.

VI

ROBERT'S DISPOSABLE INCOME

Janice contends that the trial court erred by denying her spousal support on the ground that Robert lacked the ability to pay, even though Robert had $1,094.96 a month (by her calculation) in disposable income.

Based on Robert's income and expense declaration, the trial court found that he had monthly income of $5,856.68 and monthly expenses of $5,617. That would leave him with disposable income of $239.68.

A. *2018 Versus 2019 Figures*.

Janice contends that Robert's testimony at trial established that these figures were not correct as of 2019.

First, she claims Robert admitted that, as of 2019, he was no longer paying $500 on a loan from a friend. That is true. Robert's income and expense declaration was expressly based on average figures for October 2017 through October 2018. It listed a

monthly payment of $500 on a personal loan. However, it also disclosed that in October 2018, he had paid off the loan. He confirmed this at trial.[4]

Second, she claims Robert admitted that, as of 2019, he had received cost-of-living increases that added $138.66 a month to his income. That is partly true. On the second day of trial, in 2019, Robert testified that "this year," his state teacher's disability income had been increased by 2 percent and his other income had been increased by 2.5 percent. He later clarified that the state teacher's disability income increase had actually occurred in October 2018; thus it was already reflected in his November 2018 Income and Expense Declaration. The other increases totaled $121.

As can be seen, Janice's argument rests on the premise that the trial court had to use income and expense figures for 2019, not 2018. However, she never actually articulates that premise; a fortiori, she does not cite any authority for it.

"On appeal, an order modifying spousal support obligations is reviewed for abuse of discretion." (*In re Marriage of T.C. & D.C.* (2018) 30 Cal.App.5th 419, 423.) "A trial court abuses its discretion when it exceeds the '"bounds of reason"' in exercising it, having considered all the circumstances before it. [Citation.] 'A ruling that constitutes an abuse of discretion has been described as one that is "so irrational or arbitrary that no reasonable person could agree with it." [Citation.]' [Citation.]" (*In re Marriage of Brewster & Clevenger* (2020) 45 Cal.App.5th 481, 500.)

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[4] The trial court was aware that the $500 payment had stopped. It noted this in its statement of decision.

In general, "[a] spousal support order must be consistent with the supporting spouse's ability to pay as determined by his or her circumstances at the time of the support hearing — i.e., the obligor's present (not past or future) circumstances (current income, assets, earning capacity, etc.) control." (Hogoboom, et al., Cal. Practice Guide: Family Law (The Rutter Group 2020) ¶ 6:857a, p. 6-454, italics omitted.)

For example, *In re Marriage of Rosen* (2002) 105 Cal.App.4th 808 held that the trial court erred by relying on the husband's 1996 income when setting spousal support in 1999. (*Id*. at pp. 824-825.) It noted that there was evidence as to his income in 1998. (*Id*. at p. 824; accord, *In re Marriage of Ciprari* (2019) 32 Cal.App.5th 83, 105 [trial court erred by basing support on parties' 2013 income when 2014 tax returns were in evidence].)

Here, by contrast, it was not an abuse of discretion for the trial court to use 2018 figures, because the evidence it had regarding 2019 was fragmentary. Both sides relied on their November 2018 income and expense declarations as the primary evidence of the relevant figures. With regard to Janice's income and expenses, the trial court had only 2018 figures. And with regard to Robert's income and expenses — leaving aside the loan from a friend and the cost of living increases — it also had only 2018 figures. It was not irrational or arbitrary to stick to 2018 figures to avoid comparing apples to oranges. For example, as Robert noted at trial, when he received a cost of living adjustment in 2019, so did Janice.

It is also significant that here, the trial started in December 2018. The trial court could reasonably view that as "the time of the support hearing." The first day of testimony presented only figures from 2018 and earlier. The trial had to be continued to January 2019 only because the parties exceeded their time estimate of one afternoon. Considering exclusively 2018 figures prevented either side from gaining an unfair advantage from the continuance.

The trial court was well aware of the law. On the first day of trial, it asked Janice's counsel, "Shouldn't we be focused on what her need is now? In other words, this Court is having to make a finding . . . with regard to the payee's need, so shouldn't we focus on what her need is now?" "I just need to look at this as here and now . . . ."

Under these circumstances, it was not an abuse of discretion for the trial court to disregard the fragmentary figures for 2019 that were presented to it.

B. *Double-Counting of Robert's Car Payment*.

Janice also contends that the trial court double-counted Robert's car payment.

Robert's income and expense declaration listed monthly "[s]avings and investments" of $220 and monthly car loan payments of $217.30. However, it also disclosed that the $220 was deposited automatically, and the $217.30 was automatically deducted from it, leaving only $2.70 on deposit. He explained this again at trial.

It is not clear whether the trial court was aware of this or not. Its statement of decision did not refer specifically to Robert's car payments. However, it did mention and rely on the statement in Robert's income and expense declaration that his total monthly

expenses were $5,617. According to the income and expense declaration itself, this amount was the total of each of the expenses listed individually; thus, it purported to double-count both the $220 and the $217.30.

Hence, we assume, without deciding, that the trial court did not realize that Robert's total expense figure purportedly double-counted the car loan payment. Even if so, the error was not prejudicial, because the total expense figure was wrong.

When we add up each individual expense figure, they actually total $6,140. If we exclude the double-counting of the car payment, they total $5,922.70. This is still greater than the incorrect figure of $5,617, on which the trial court relied.

Moreover, after correcting the double-counting, Robert's monthly income ($5,856.68) was less than his true monthly expenses ($5,922.70). Thus, the trial court correctly found that Robert lacked the ability to pay spousal support and that, if it ordered him to pay, it "would need to take the funds from a disabled military veteran who would then be unable to meet his own legitimate living expenses."

Finally, the trial court strongly suggested that, even if Robert had some limited ability to pay, it would not award spousal support. It noted that "[p]ost-dissolution support is typically awarded for only as long as necessary to permit the supported spouse to become self-supporting." It also stated, "[Janice] has had thirty-three (33) years after termination of the marriage to become self-supporting. [Janice] did just that." For this reason, too, Janice cannot show that, even if Robert's expenses were $217.30 less than the trial court believed, it would have awarded spousal support.

VII

DOUBLE-COUNTING ROBERT'S DEBT

Janice contends that the trial court "double-count[ed]" Robert's debt.

A. *Additional Factual and Procedural Background.*

Robert's monthly expenses included $1,602 for "[m]onthly payments." This was further broken down into payments to seven separate lenders, which did indeed total $1,602 (after rounding). His monthly expenses also included a $992 mortgage payment and the $217.30 car payment. He owed his attorney $15,500.

In discussing the payor's needs (see § 4320, subd. (d)), the trial court observed that: "[Robert] has an extraordinary amount of both secured and unsecured debt . . . ."

B. *Discussion.*

Janice seems to be arguing that the trial court's comment showed that it double-counted the $1,602. We fail to see how.

More generally, she also seems to be arguing that the trial court had already given adequate consideration to Robert's debts, by including his debt payments in his expenses. She does not show, however, how its comment that the amount of these debts was "extraordinary" resulted in double-counting them. It simply observed that debt was a relatively large category of his expenses, and one that he had little ability to reduce.

VIII

CONFLICTING ASSERTIONS ABOUT JANICE'S OBLIGATION TO WORK

Janice contends that the trial court's statement of decision is internally inconsistent with regard to whether she is obligated to work.

A. *Additional Factual and Procedural Background*.

In discussing the marketable skills of the supported party (§ 4320, subd. (a)(1)), the statement of decision said: "[Janice] should not be expected to keep working past her normal retirement age just so that her husband does not have to pay spousal support."

In discussing the age and health of the parties (§ 4320, subd. (h)), it said: "Although [Janice] is well beyond the normal retirement age, there was no health reason articulated that would preclude her from seeking or obtaining gainful employment."

B. *Discussion*.

We perceive no inconsistency. In the second quoted passage, the trial court simply observed that Janice could work if she wanted to. If the opposite were true — if she were physically incapable of working — that would certainly be relevant. Hence, it was worth making a finding on this point.

In the first quoted passage, however, the trial court plainly ruled that Janice was not obligated to go back to work, and that her failure to do so could not be held against her. Consistent with this, it qualified the second passage by adding that, although she could work, she was past retirement age.

IX

CONSIDERING ROBERT'S LIABILITY FOR ATTORNEY FEES

Janice contends that the trial court erred by considering Robert's liability for her attorney fees.

A. *Additional Factual and Procedural Background*.

As mentioned, in 2015, the trial court awarded Janice $7,180 in attorney fees. By 2019, this had grown, with interest, to $9,603. The trial court allowed Robert to offset the $8,531 that he had paid in spousal support against these attorney fees.

In its statement of decision, in discussing the payor's needs (§ 4320, subd. (d)), the trial court said: "In addition to the expenses listed, the court is also cognizant that [Robert] is obligated to pay [Janice]'s attorney fees from the last trial in the sum of . . . $9,603.00."

B. *Discussion*.

Janice argues that the accrued attorney fees "appeared to factor heavily in the trial court's conclusion that Robert could not afford spousal support," even though, after the offset, they totaled only $1,072.

This overlooks the fact that Robert was entitled to the $8,531. Janice had collected it from him pursuant to the 2015 support award support, which we reversed. The $9,603 had to be paid out of his assets or income somehow. Thus, the trial court could consider the fact that he was liable for $9,603, no matter how he paid it.

In addition, it does not appear that the trial court's consideration of this factor was in any way determinative. It was just one of many factors that it listed in its decision. Elsewhere, it also noted the offset. Obviously, it was aware of and it considered both the liability and the offset. Janice has not shown that it erred in any way by merely considering them.

X

DENIAL OF ADDITIONAL ATTORNEY FEES

Janice contends that the trial court erred by denying her additional attorney fees.

The trial court's denial of attorney fees incorporated by reference its discussion of its reasons for denying spousal support. Accordingly, Janice incorporates by reference all of her arguments regarding spousal support. Consistent with this approach, we find no error in denying attorney fees, for all the reasons stated above.

XI

DISPOSITION

The order appealed from is affirmed. In the interest of justice, we do not award costs.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

McKINSTER
J.

CODRINGTON
J.